Supreme Court of the United States

OCTOBER TERM, 1940.

No. 217

RALPH R. KELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellee below, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on April 9th, 1940.

Opinions Below.

Judge Otis of the District Court of the United States for the Western District of Missouri rendered an opinion fav-

orable to petitioner on the question of the statute of limitations herein involved (R. 8-9). The Opinion of the United States Circuit Court for the Eighth Circuit reversing Judge Otis is set forth in the record. (R. 288-294.)

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 9th, 1940 (R. 292-293). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the Act of January 28, 1935 (38 U. S. C. A. 445c) defining "disagreement" under Section 19 of the World War Veterans' Act also operates as a retroactive statute of limitations so as to bar by retroactive legislation a right to bring suit on a war risk insurance contract.

Statutes Involved.

The pertinent statutes are fully set forth in the brief.

Statement of Facts.

The petitioner filed this action on a war risk insurance contract in the District Court for the Western District of

Missouri. Three causes of action were stated, the first alleged a permanent and total disability of petitioner as of February 1, 1925, the second a permanent and total disability as of July 1, 1927, and the third a permanent and total disability as of May 1, 1929. (R. 6.) The complaint further alleged that the petitioner filed a claim for his insurance benefits with the Veterans' Administration on May 26, 1931 (R. 2) and that such claim was finally denied on May 4, 1938. Suit was filed 14 days after the denial on May 18th, 1938. (R. 7.) The answer sets forth that the claim for insurance benefits filed on May 26, 1931 was denied by the Insurance Claims Council of the Veterans' Administration on August 24, 1932 (R. 12) and that on October 25, 1935 the plaintiff through his attorney requested further reconsideration of the claim and the answer further alleges that this claim was denied by the Board of Veterans' Appeals on May 4, 1938 (R. 12).

The District Court overruled the plea of the statute of limitations. (Opinion R. 8-9.)

There was a trial and a jury verdict in favor of the petitioner. The jury found that the petitioner became permanently and totally disabled as of May 1, 1929. (R. 14.) Judgment was entered in petitioner's favor on April 18, 1939. (R. 15.)

From this judgment the United States appealed and assigned two errors. (R. 21.) First that the Court erred in overruling its motion to dismiss the suit on the ground that the action was barred by the statute of limitations, and second upon the ground that the Court should have granted its motion for a directed verdict at the close of all the testimony.

The Circuit Court considered only one question on appeal, that relating to the Statute of Limitations.

The Circuit Court held that a statute enacted on January 28, 1935 (38 U. S. C. A. 445c) defining "disagreement" under the World War Veterans' Act was an amendment to the Statute of Limitations and that it was to be applied retroactively from July 3, 1930, and by retroactive application the action of the petitioner was barred by the statute of limitations. The question arises whether the amendment of January 28, 1935 defining "disagreement" was an amendment of the statute of limitations, and if so, could such a statute bar a suit by retroactive application when no right to sue the government on the insurance contract in question could have arisen until the statute of January 28, 1935 was enacted. It is admitted that during the period from July 3, 1930 to January 28, 1935 no District Court of the United States had jurisdiction of petitioner's cause of action under the then existing laws providing for suits against the government on war risk insurance contracts.

Specification of Errors to be Urged.

The United States Circuit Court of Appeals erred in holding that the petitioner's cause of action was barred by the statute of limitations, and in holding that the Act of January 28, 1935 (38 U. S. C. A. 445c) defining disagreement was an amendment to the Statute of Limitations.

Reasons for Granting the Writ.

The petitioner asserts that a writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Court in

that the United States Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this Court, and second upon the ground that it has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and third upon the ground that it has so far departed from the accepted and usual course of judicial proceedings that it calls for the exercise of this Court's power of supervision; because the Circuit Court ignored the express language of the statute of limitations contained in Section 19 of the World War Veterans' Act (38 U. S. C. A. 445) and applied language relating to the definition of a "disagreement" under the Act to the statute of limitations.

Argument and Brief.

This suit is brought under the provisions of Section 19 of the World War Veterans' Act as amended July 3, 1930. (38 U. S. C. A. 445.)

This amendment provides in part as follows:

> In the event of disagreement as to claim, including claim for refund or premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall

have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the latter date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war-risk insurance on the ground that the claim was barred by the statute of limitations shall not be a bar to the institution of another suit on the same claim. No State or other statute of limitations shall be applicable to suits filed under this section. * * * and the term disagreement means a denial of the claim by the Director or some one acting in his behalf on an appeal to the Director. * * *

It is to be noted that this amendment provides that a claim for insurance must be denied by the Director upon

an Appeal to the Director before suit may be brought against the United States.

The Insurance Claims Council which denied the petitioner's claim on August 24, 1932 (R. 12) was an intermediate Board of the Veterans' Administration. Its decision did not constitute a denial by the Director upon an appeal to the Director. Such a denial did not create a disagreement under the Act of July 3, 1930.

After the Act of July 3, 1930 many hundreds of suits were brought on war risk insurance contracts after decisions by the Insurance Claims Council. In practically every instance, the government pleaded that the District Courts had no jurisdiction because the claimants had not obtained a denial of the claim by the Director upon an appeal to the Director.

In this situation, the case of Frederick v. United States was certified to this Court by the United States Circuit Court of Appeals for the Eighth Circuit.

The question certified was whether the Director of the Veterans' Administration could delegate his authority to finally deny claims for insurance so that suits could be brought on such claims in the District Courts, on such disagreements.

After the Frederick case was argued in this Court a motion for a stay was made until Congressional legislation could be enacted "defining disagreement." This legislation was enacted on January 28, 1935, and was as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That a denial of a claim for insurance by the

> Administrator of Veterans' Affairs or any employee or agency of the Veterans' Administration heretofore or hereafter designated therefor by the Administrator shall constitute a disagreement for the purposes of section 19 of the World War Veterans' Act, 1924, as amended (U. S. C. Supp. VII, title 38, sec. 445). This resolution is made effective as of July 3, 1930, and shall apply to all suits now pending against the United States under the provisions of section 19 of the World War Veterans' Act, 1924, as amended, and any suit which has been dismissed solely on the ground that a denial as described in this resolution did not constitute a disagreement as defined by section 19 may be reinstated within three months from the date of enactment of this resolution.

It was made retroactive for the purpose of vesting jurisdiction in the District Courts of cases then pending where suits had been brought on war risk insurance contracts after denials by the Insurance Claims Council.

After this statute was enacted this Court reversed and remanded the case of Frederick v. United States for trial (294 U. S. 695, 79 L. Ed. 101).

It is this statute with which we are here concerned. The petitioner asserts that it is a statute defining a "disagreement." The respondent claims and actually convinced the Circuit Court below that it was a retroactive statute of limitations.

If there was any ambiguity in the language resort may be had to the reports of the World War Veterans' Committee which handled the amendment in question.

> Duplex Printing Company v. Deering, 65 L. Ed. 349, 254 U. S. 443.

The World War Veterans' Committee of the House of Representatives made its report on the amendment of January 28, 1935 defining "disagreement" on January 21, 1935. (74th Congress 1st Session Report No. 11.) The Committee said that the proposed amendment was for two purposes. The first purpose was to remove any doubt as to the definition of disagreement and the second purpose was to permit the reinstatement of any suit which has been dismissed solely on the ground that denial so described in the resolution did not constitute a disagreement under the provisions of Section 19 of the World War Veterans' Act. Nothing was said in the report of the Committee about modifying or amending the statute of limitations.

There has never been any amendment to the statute of limitations providing that when a claim for insurance was timely filed the statute was suspended until the denial of the claim by the Director.

The respondent successfully contended in the Circuit Court below that the Act of January 28, 1935, was an amendment to the statute of limitations, and that because Congress expressly made it retroactive, the statute of limitations in this case commenced to run from the date of the denial by the Insurance Claims Council on August 24, 1932.

In other words, the petitioner could not have brought a suit on the denial of the Insurance Claims Council because the District Court had no jurisdiction but nevertheless the respondent contends the statute of limitations was running during all of this period by retroactive application.

The petitioner asserts that the statute was suspended when he filed a claim for insurance on May 20, 1931 (R. 12)

until the claim was denied by the Director upon an appeal to the Director on May 4, 1938 (R. 12).

The permanent and total disability of the petitioner was claimed as of May 1, 1929. If no claim had been filed the six-year statute would have completely run on May 1, 1935.

The Act of July 3, 1930, (38 U. S. C. A. 445) providing a six-year statute of limitations provides specifically as follows:

> "Provided further that this limitation is suspended for the period elapsing between the filing in the Bureau of the claim sued upon and the *denial of the claim by the Director.*"

When petitioner filed his claim on May 20, 1931, the statute was suspended if as District Judge Otis said "If the statute is to be taken as it is written" (R. 9) until the claim was denied by the Director on May 4, 1938. The Board of Veterans' Appeals represent the Director.

In any event, the statute could not commence to run until January 28, 1935 when the denial of the Insurance Claims Council became for the first time a disagreement. Even this view requires judicial legislation.

However, if this view is taken the action filed on May 18, 1938 was seasonably begun.

Under this rule the statute of limitations commenced to run as of May 1, 1929, and it ran for two years and 19 days until a claim was filed with the Veterans' Administration. It remained in suspense until the denial by the Insurance Claims Council which became a disagreement on January

28, 1935. The statute then commenced to run again and ran until October 25, 1937, when the case was reopened. This is a period of two years and some nine months. It remained in suspense until the denial by the Board of Veterans' Appeals on May 4, 1938. The statute then commenced to run again and the petitioner had one year and approximately ten months after May 4, 1938 in which to timely file suit. He filed suit within fourteen days.

The above might be a reasonable interpretation of the statute of limitations but to assert that the Act of January 28, 1935 defining disagreement was a retroactive statute of limitations is not only untenable but also unthinkable when it is to be remembered that the amendment in question was handled by the World War Veterans' Committee of the House of Representatives composed wholly of World War Veterans.

It would be a brave man indeed who would appear before the World War Veterans' Committee and inform them that they sold their permanently and totally disabled comrades down the river by a retroactive statute of limitations. Certainly no one at all familiar with the legislative actions of the World War Veterans' Committee would ever make such an assertion in good faith.

In the case of Parker v. United States filed in the District Court of the United States for the Northern District of West Virginia, the District Court applied the January 28, 1935 amendment in question as a retroactive statute of limitations. This case is now pending on appeal in the United States Circuit Court of Appeals for the Fourth Circuit.

In the Parker case the plaintiff filed a claim for permanent and total disability benefits with the Veterans' Administration on October 30, 1930. His claim was denied by the Insurance Claims Council on April 29, 1932. He filed suit in the District Court on January 24, 1933, and this suit was voluntarily dismissed on in November, 1933 because of "no disagreement." Parker asked reconsideration of his claim in the Veterans' Administration on February 23, 1935, and the case was under consideration in the Veterans' Administration until April 4, 1936, when it was again denied. He filed suit on May 4, 1936. The government conceded that he had 246 days after a "denial" in which to file suit but contended that because of the Act of January 28, 1935 defining disagreement that the statute ran from April 29, 1932, the date of the decision by the Insurance Claims Council because the statute was an amendment to the statute of limitations and by retroactive application it ran regardless of whether any District Court had jurisdiction. It was therefore barred before January 28, 1935, even though he had no right to bring suit. The net result is that if the District Court in the Parker case is sustained that the plaintiff never had any rights under the statute of limitations enacted on July 3, 1930.

If this Court believes that this absurd and unwarranted construction of the January 28, 1935 amendment defining "disagreement" is just and proper then this petition for a writ of certiorari should be denied, but if on the other hand, as petitioner believes that the law of right and justice is still the prevailing rule in the Courts of this country then this petition for a writ of certiorari should be granted.

Attention of the Court is particularly directed to the fact that under the Act of July 3, 1930 providing for a statute of limitations this petitioner could not have filed a

suit after a denial by the Insurance Claims Council of his claim on August 24, 1932 because it was not a final denial, there was no disagreement. The decision of the Insurance Claims Council only became a disagreement by retroactive application of the Act of January 28, 1935, defining a disagreement.

The petitioner contends with great earnestness and frankness that the interpretation that the Act of January 28, 1935 defining "disagreement" is a retroactive statute of limitations is nothing more or less than judicial legislation.

The respondent will probably argue that unless the statute of limitations does commence to run from the date of a decision by an inferior tribunal that there may be an indefinite suspension of the statute.

The complete answer to that argument is the regulations promulgated by the Veterans' Administration. It was recognized that under the Act of July 3, 1930, defining disagreement as a "denial by the Director upon an appeal to the Director" that a veteran having timely filed his claim for insurance benefits was entitled to a "disagreement" upon which a suit could be brought in the District Courts of the United States.

Therefore on March 16, 1931 regulation 1000 was promulgated, the pertinent parts of which are as follows:

> A. Duties and Functions: The Insurance Claims Council is vested with exclusive authority to render *original* decisions on all claims for permanent and total disability for insurance, together with any other claims for such benefits that may be referred thereto by the Director. * * *

B. * * *

C. Where the Insurance Claims Council finds that total and permanent disability does not exist as alleged in the claim, appeal may be taken in the usual manner from such decision by the claimant, or his duly authorized representative, to the Administrator of Veterans' Affairs, provided such appeal is made within sixty days from the date of notification of such decision. * * * When no appeal is made by claimant or his duly authorized representative within said period of sixty days, the decision of the Insurance Claims Council and all other records pertaining thereto, including the case folder, shall be referred to the Administrator of Veterans' Affairs for his approval or disapproval of said decision. * * * (March 16, 1931.)

Under this regulation the Veterans' Administration assumed the burden of furnishing a claimant with a disagreement. The respondent will probably cite certain regulations issued on November 1, 1931 (3200-3204). These regulations were involved in the case of Frederick v. United States, *supra*. Reference of the Court is directed to the briefs filed by the United States in this Court in the Frederick case. The government in the Frederick case doubted the validity of these regulations. Yet they were cited in its brief in the Circuit Court below as valid and existing regulations. The only valid regulation of the Veterans' Administration in force until January 28, 1935 relating to this matter required the Insurance Claims Council to forward a claimant's file to the Administrator of Veterans' Affairs for his approval or disapproval of its decision. If this had been done the statute of limitations would have commenced to run from the date of the Administrator's action.

As was pointed out by the United States Court of Appeals for the District of Columbia in the war risk insurance case of Rosario v. United States, 106 Fed. (2) 844, the Veterans' Administration could at any time take final action on an insurance claim and thus commence the running of the statute. This Court denied a petition for certiorari filed by the government in the Rosario case, 84 L. Ed. 101.

If this petition for a writ of certiorari is granted a further and more extensive brief on the question at issue will be filed with this Court.

Conclusion.

WHEREFORE, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Circuit Court of Appeals for the Eighth Circuit and upon such a review the judgment of the Circuit Court of the Appeals for the Eighth Circuit be vacated, reversed and set aside, and that this case be remanded to that Court with instructions to proceed further in accordance with the views of this Court.

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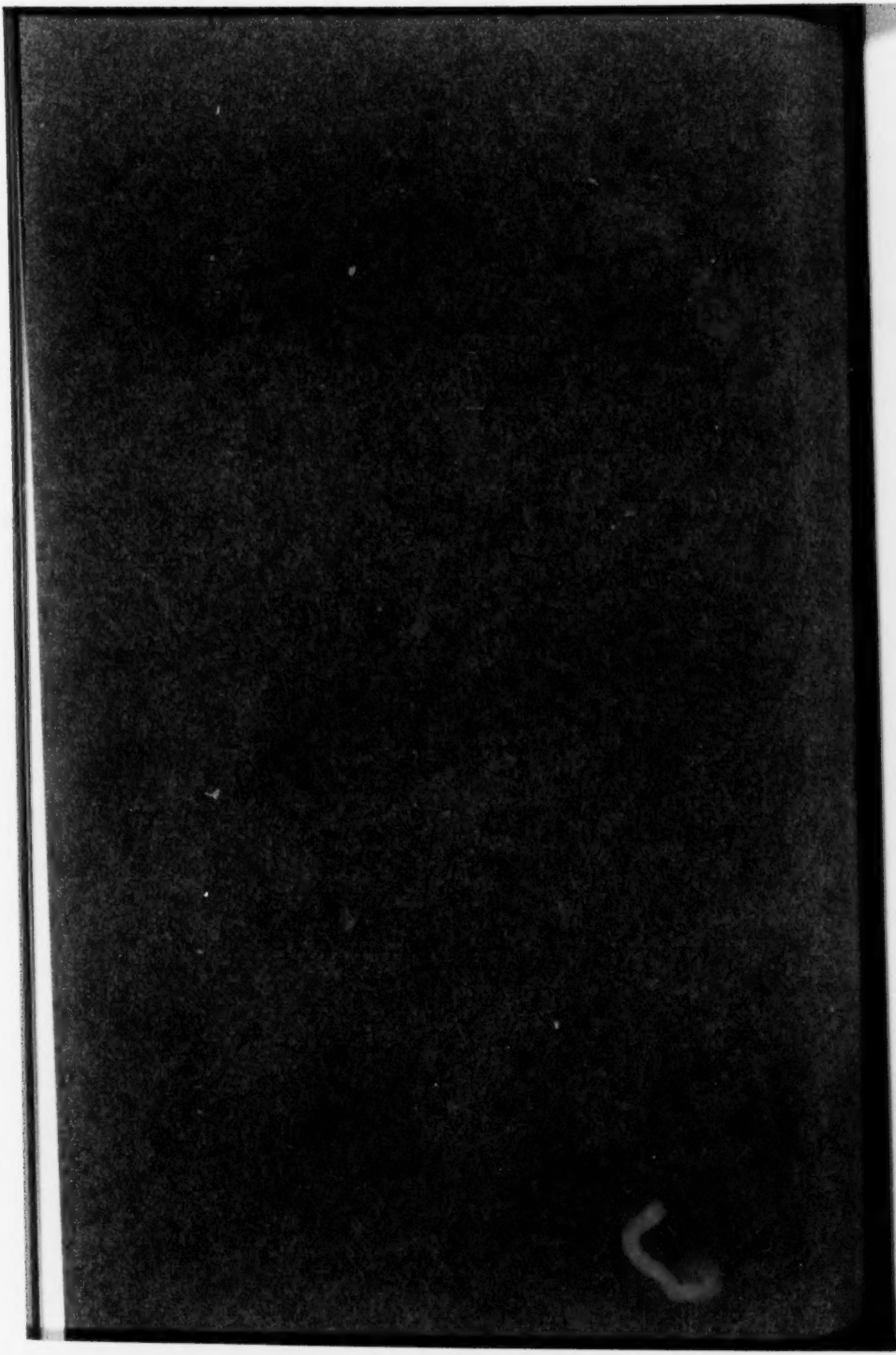
BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINIONS BELOW

The opinion of the District Court (R. 8–9) is not reported. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 288–292) is reported in 110 F. (2d) 922.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 9, 1940 (R. 292–293). The petition for a writ of certiorari was filed on July 8, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under Section 19 of the World War Veterans' Act the running of the six year period of limitation is suspended from the time a claim for insurance benefits is filed in the Veterans' Administration until the claim is denied by the Administrator of Veterans' Affairs. The question is whether the statute again began to run when petitioner's claim was denied by the Insurance Claims Council, an agency within the Veterans' Administration acting under authority delegated to it by the Administrator.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations appear in the Appendix, *infra,* pp. 14–22. The limitation provision directly involved, contained in Section 19 of the World War Veterans' Act (U. S. C., Title 38, Sec. 445), is as follows:

* * * * *

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930 * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial

of said claim by the Administrator of Veterans' Affairs. * * *

STATEMENT

Petitioner brought suit in the United States District Court for the Western District of Missouri on May 18, 1938, alleging that he became totally permanently disabled on May 1, 1929, while his contract of yearly renewable term insurance was in force (R. 1–7). Respondent moved to dismiss the petition on the ground that the right of suit was barred by the statute of limitations, which motion was overruled (R. 8–9). Respondent's answer denied that petitioner became totally permanently disabled on May 1, 1929[1] (R. 13). A jury trial resulted in a verdict and judgment for the petitioner, after the District Court overruled respondent's motion for a directed verdict (R. 266). Upon appeal, the Circuit Court of Appeals for the Eighth Circuit reversed, because the right

[1] Other material facts established by the pleadings and by a stipulation of the parties are that the policy sued on was issued to the petitioner on September 2, 1918 (R. 24); that it provided for payment to him in the amount of $57.50 per month, in the event he became totally permanently disabled while the policy was in force (R. 4, 11); that the policy lapsed on February 1, 1925 for nonpayment of premiums, but that, by reason of the provisions of Section 305 of the World War Veterans' Act (U. S. C., Title 38, Sec. 516), the policy was revived on May 1, 1929, and matured on that date if petitioner then became totally permanently disabled as alleged (R. 24–25).

of suit was barred by the statute of limitations. It therefore did not rule upon the appeal from the denial of respondent's motion for a directed verdict.

The facts relating to the question of limitations were submitted in an agreed statement of facts and exhibits which, in substance, together with undisputed pertinent provisions of law, are as follows:

The applicable period of limitations is six years (Sec. 19, World War Veterans' Act, Appendix, *infra,* p. 15), which commenced to run on May 1, 1929, the date upon which petitioner claims to have become totally permanently disabled.[2] On May 20, 1931, petitioner filed a claim for insurance benefits in the Veterans Administration (R. 26), which suspended the running of limitations. The Insurance Claims Council, a subordinate agency within the Veterans Administration, denied this claim on August 24, 1932, and gave petitioner notice of the denial in a letter dated August 27, 1932 (R. 29–30). The letter, in material part, read:

> You are informed that a decision was rendered on August 24, 1932, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at the time when the

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[2] Pet. 10; and see *United States* v. *Towery*, 306 U. S. 324, rehearing denied, 306 U. S. 668.

contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record.

No further action was taken by either party until October 19, 1937, when, through his attorney, the petitioner again wrote to the Veterans Administration demanding payment of insurance benefits (R. 244–245). In a letter dated November 4, 1937, the Director of Insurance, adhering to the decision of the Insurance Claims Council of August 24, 1932, advised the petitioner that the claim was denied (R. 30–32). Upon the basis of a letter from petitioner's attorney, dated November 9, 1937, the Insurance Claims Council again considered the claim and rendered a decision denying it on January 31, 1938 (R. 33). Upon appeal, this decision was affirmed by the Board of Veterans' Appeals in a decision rendered on May 4, 1938 (R. 32–35).

If, as held by the Circuit Court of Appeals, the suspension of the limitation which commenced

when the petitioner's claim was filed on May 20, 1931, ended upon notice to petitioner of the denial of the claim by the Insurance Claims Council on August 24, 1932, the suit instituted on May 18, 1938, is barred. If, as petitioner contends, the suspension of the limitation did not end with the denial of the claim on August 24, 1932, but continued until the decision of the Board of Veterans' Appeals was rendered on May 4, 1938, the suit is timely.

ARGUMENT

The petitioner contends (1) that the denial by the Insurance Claims Council on August 24, 1932 was not a disagreement,[3] and (2) that the suspension of limitations invoked by his filing of claim on May 20, 1931 was not terminated until a disagreement as defined by statute arose. Without deciding that the suspension necessarily continued until a disagreement arose, the Circuit Court of Appeals held that the denial of August 24, 1932 was a disagreement.

1. The decision of the court below, that the denial by the Insurance Claims Council was a disagreement and terminated the suspension of the statute of limitations, followed *Simmons* v. *United States,* 110 F. (2d) 296, on rehearing, 111 F. (2d) 618 (C. C. A. 4th), and accords in principle with

[3] He relies upon the definition of disagreement contained in an amendment to Section 19 of the World War Veterans' Act on July 3, 1930 (Appendix, *infra*, p. 16). See also House of Representatives Report No. 11 (Appendix, *infra*, pp. 19–21).

Frederick v. *United States,* 294 U. S. 695; *Ball* v. *United States,* 101 F. (2d) 272 (C. C. A. 6th), certiorari denied, 308 U. S. 563; *Williams* v. *United States,* 108 F. (2d) 1023 (C. C. A. 6th), certiorari denied, No. 860, October Term, 1939; *Burns* v. *United States,* 101 F. (2d) 83 (C. C. A. 2d); and *Harris* v. *United States,* 72 F. (2d) 982 (C. C. A. 4th). There is no decision of any appellate court in conflict.[4]

The petitioner relies upon the amendment of July 3, 1930, to Section 19 of the World War Veteran's Act, defining "disagreement" as a denial on appeal to the Administrator, while the decision below was based upon the amendment of January 28, 1935, to Section 19 (Appendix, *infra,* pp. 16–17). The latter amendment provides:

> A denial of a claim for insurance by the Administrator of Veterans' Affairs or any employee or agency of the Veterans' Administration heretofore or hereafter designated therefor by the Administrator[5] shall consti-

[4] Petitioner has suggested that the question was decided in a way "probably in conflict with applicable decisions of this Court" (Pet. 5), but has indicated no such decision considered by him to be in conflict. *Rosario* v. *United States,* 106 F. (2d) 844 (App. D. C.), certiorari denied, 308 U. S. 606, not relied upon by petitioner as in conflict, followed the decision in *United States* v. *Bollman,* 73 F. (2d) 133 (C. C. A. 8th), and was distinguished in the opinion on rehearing in *Simmons* v. *United States,* 111 F. (2d) 618, *supra.*

[5] By Regulations Nos. 3200, 3201, and 3204, promulgated by the Administrator of Veterans' Affairs on November 1,

> tute a disagreement for the purposes of section 445 of this title. This section is made effective as of July 3, 1930, and shall apply to all suits pending on January 28, 1935, * * *.

The court below therefore held that the amendment established the denial of petitioner's claim by the Insurance Claims Council on August 24, 1932 as a disagreement, regardless of whether it would have been a disagreement in the absence of that amendment, so that the statute of limitations started running (R. 291). The ruling is the converse of the decision of this Court in *Frederick* v. *United States, supra,* that under the amendment of January 28, 1935, a denial of Frederick's claim for insurance benefits by the Insurance Claims Council on November 4, 1932, was a disagreement sufficient to permit suit to be brought.

The provision in the amendment of January 28, 1935, making it effective as of July 3, 1930, leaves

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1931 (Appendix, *infra*, pp. 17–19), the Insurance Claims Council had been vested with authority to finally deny a claim for insurance benefits, subject only to the right of appeal to the Administrator within sixty days. This authority was conferred upon the Insurance Claims Council by the Administrator under authority vested in him by Section 5 of the World War Veterans' Act (Appendix, *infra*, p. 14), which provides, in part, that: "All officers and employees of the Veterans' Administration shall perform such duties as may be assigned them by the Administrator. All official acts performed by such officers or employees specifically designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person."

no room for doubt that retroactive application of the statute was intended.[6]

The decision below results in no hardship or inequitable treatment, but is consistent with the view that claimants are entitled to such rights as they have taken action to preserve for themselves under the Act of July 3, 1930. Claimants who, considering that the Act of July 3, 1930 required a denial upon appeal to the Administrator before suit could be brought, took an appeal to the Administrator within the time prescribed by regulations, have been held to be entitled to a suspension of limitations until a denial of the claim upon appeal. *Danner* v. *United States,* 100 F. (2d) 43 (C. C. A. 8th); see *Howard* v. *United States,* 97 F. (2d) 987 (C. C. A. 6th); *Harris* v. *United States,* 72 F. (2d) 982 (C. C. A. 4th). Likewise, claimants who brought suit upon a denial by the Insurance Claims Council without taking an appeal have been held protected by the amendment of January 28, 1935. *Frederick* v. *United States,* 294 U. S. 695, *supra; James* v. *United States,* 87 F. (2d) 897 (C. C. A. 8th). Petitioner's present predicament is due entirely to the fact that he neither brought timely suit when his claim was denied by the Insurance Claims Council, as did Frederick, nor took a timely

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[6] Further evidence of such intention is contained in the report of the Committee of the House of Representatives on World War Veterans' Legislation, recommending enactment of the legislation of January 28, 1935 (H. Rep. No. 11, 74th Cong., 1st Sess., Appendix, *infra*, p. 19).

appeal to the Administrator of Veterans' Affairs, as did Danner, to prevent the denial by the Insurance Claims Council from becoming final.

Since there is no limitation upon the right to file a claim for insurance in the Veterans Administration, or upon the power and duty of the Administrator to consider claims, it is not significant that the Veterans Administration considered the petitioner's claim after the right to sue thereon was barred. Compare *Ball* v. *United States,* 101 F. (2d) 272 (C. C. A. 6th), certiorari denied, 308 U. S. 563; *Burns* v. *United States,* 101 F. (2d) 83 (C. C. A. 2d); *Jenkins* v. *United States,* 86 F. (2d) 123 (C. C. A. 5th); and *Dowell* v. *United States,* 86 F. (2d) 120 (C. C. A. 5th). There is nothing in the statute restricting Veterans Administration consideration of a claim, regardless of the lapse of time, and even a judicial determination that suit is barred would not preclude administrative payment upon a finding that the insurance had matured.[7] The administrative reconsideration is, therefore, irrelevant to the statutory limitation upon bringing suit.

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[7] For this reason, the Court will note, the limitation problems of the War Risk litigation differ somewhat from those of the Internal Revenue litigation. But even in the latter field a reconsideration by the Commissioner after the statutory period would not start a new period of limitation for bringing suit. *United States Trust Co.* v. *United States,* 23 F. Supp. 476 (C. Cls.); *United States* v. *First National Bank,* 102 F. (2d) 907 (C. C. A. 7th), certiorari denied, 307 U. S. 641.

2. Even if it were assumed that the denial of the petitioner's claim on August 24, 1932 was not a disagreement, petitioner's suit would yet be barred. As pointed out in the opinion of the District Court (R. 9), there is a difference between the requirements of the statute with respect to the termination of the suspension of limitations and the existence of a disagreement.

The World War Veterans' Act has provided in Section 19 (since May 29, 1928, when the first limitation provision was enacted) (Appendix, *infra*, p. 16), that the suspension of limitations authorized in that section should cease on the denial of the claim "by the director"[8] and in Section 5, as enacted on June 7, 1924 (Appendix, *infra*, p. 14), that all official acts performed by officers or employees specially designated therefor by the director "shall have the same force and effect as though performed by the director in person". Since the denial of petitioner's claim by the Insurance Claims Council on August 24, 1932 had the same force and effect as a denial by the Administrator, the suspension of the limitation must be regarded as terminated thereby under the plain provision of the statute, without regard as to whether that

[8] By Executive Order No. 5398, issued on July 21, 1930, pursuant to legislation enacted on July 3, 1930 (c. 863, Sec. 1, 46 Stat. 1016), all power and authority previously lodged in the Director of the United States Veterans' Bureau was vested in the Administrator of Veterans' Affairs.

denial also constituted a disagreement sufficient to permit suit to be brought.[9]

The purpose of the suspension provision was to prevent the running of the limitation period during the time the claim was not within the control of the claimant. This purpose would be achieved by regarding the suspension as having terminated when, upon a denial of a claim by the Insurance Claims Council, not appealed from, administrative consideration of the claim ceased, regardless of whether there was a disagreement and, therefore, an immediate right to sue. The purpose of the limitation in Section 19, which is a statute of repose (*United States* v. *Towery,* 306 U. S. 324), would be defeated if, as is implicit in the petitioner's contention, the running of limitations might be suspended indefinitely at the option of the claimant by inaction at a time when no administra-

[9] Section 19 has, from its first enactment, required a disagreement as a condition to the bringing of suit, but originally the term was not defined. The amendment to the World War Veterans' Act of July 3, 1930, defined a disagreement as "a denial of the claim by the [director] or someone acting in his name on an appeal to the [director]" and the Acts of January 28, 1935, and June 29, 1936, contained further definitions of that term. That the original provisions with respect to the termination of the suspension have remained unchanged, while the administrative action constituting a disagreement has three times been the subject of Congressional action, appears significant of an intention on the part of Congress to differentiate between the administrative action terminating the suspension of limitations, and the administrative action constituting a disagreement.

tive consideration of the claim was pending and when, therefore, there was nothing to prevent further action by the claimant.

CONCLUSION

The decision of the court below is correct, and is not in conflict with any other decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1940.

APPENDIX

Section 5 of the World War Veterans' Act (U. S. C., Title 38, Sec. 426) provides:

> The Administrator of Veterans' Affairs, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this chapter, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this chapter, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this chapter; and all decisions of questions of fact and law affecting any claimant to the benefits of Parts II, III, or IV of this chapter shall be conclusive except as otherwise provided herein. All officers and employees of the Veterans Administration shall perform such duties as may be assigned them by the Administrator. All official acts performed by such officers or employees specially designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. Wherever under any provision or provisions of this chapter regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the Administrator. The Administrator shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same

in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this chapter, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs and evidence shall provide that due regard shall be given to lay and other evidence not of a medical nature.

Section 19 of the World War Veterans' Act (U. S. C., Title 38, Sec. 445–445d), as amended on and after July 3, 1930, provides in pertinent part:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date. * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided*

further, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans Affairs. * * *

* * * * * *

The term "claim", as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term "disagreement" means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter. (As amended July 3, 1930, U. S. C., Title 38, Sec. 445.)

A denial of a claim for insurance by the Administrator of Veterans' Affairs or any employee or agency of the Veterans' Administration heretofore or hereafter designated therefor by the Administrator shall constitute a disagreement for the purposes of section 445 of this title. This section is made effective as of July 3, 1930, and shall apply to all suits pending on January 28, 1935, against the United States under the provisions of section 445 of this title, and any suit which has been dismissed solely on the ground that a denial as described in this section did not constitute a disagreement as defined by section 445 of this title may be reinstated within three months from Janu-

ary 28, 1935. (Amendment of January 28, 1935, U. S. C., Title 38, Sec. 445c.)

In addition to the suspension of the limitation for the period elapsing between the filing in the Veterans' Administration of the claim under a contract of insurance and the denial thereof by the Administrator of Veterans' Affairs or someone acting in his name, the claimant shall have ninety days from the date of the mailing of notice of such denial within which to file suit. This section is made effective as of July 3, 1930, and shall apply to all suits now pending on June 29, 1936, against the United States under the provisions of section 445 of this title; and any suit which has been dismissed solely on the ground that the period for filing suit has elapsed but where in the extension of the period for filing suit as prescribed herein would have permitted such suit to have been heard and determined may be reinstated within ninety days from June 29, 1936; * * * the term "denial of the claim" means the denial of the claim after consideration of its merits. (Amendment of June 29, 1936, U. S. C., Title 38, Sec. 445d.)

Veterans' Administration Regulations Nos. 3200, 3201, and 3204, promulgated on November 1, 1931, provide:

3200. ESTABLISHMENT OF INSURANCE CLAIMS COUNCIL.—There is hereby established in the insurance service, central office, an insurance claims council which will be in charge of a chief who shall be responsible to the director of insurance for the proper functioning of such council. The council shall be composed of such other personnel as may be found necessary for the purpose of

centage of which have denials the same as that made in the Frederick case.

The second purpose of the resolution is to permit reinstatement of any suit which has been dismissed solely on the ground that denial as described in the resolution did not constitute a disagreement under the provisions of section 19, World War Veterans' Act, 1924, as amended, such reinstatement being permitted within 3 months from the date of the enactment of the resolution. The purpose of permitting reinstatement rather than refiling is to avoid the necessity for the payment of filing fees a second time in the same action.

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